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March 15, 1999

Ms. Irene Bleiweiss
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Federal Communications Commission
The Portals II
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Room 2-B450
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FEDERAL COMMUNICATIONS COMMISSION
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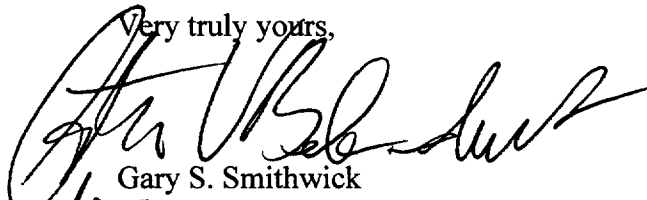
Re: MM Docket No. 95-31

Dear Ms. Bleiweiss:

Transmitted herewith, on behalf of Lakefront Communications, Inc. ("Lakefront"), and pursuant to paragraph 49 of the *Further Notice of Proposed Rule Making*,¹ in MM Docket No. 95-31, is a diskette on which is saved in WordPerfect 5.1 format the Reply Comments of Lakefront.

If there are any questions with respect to this matter, please communicate with the undersigned.

Very truly yours,


Gary S. Smithwick
for Counsel for
LAKEFRONT COMMUNICATIONS, INC.

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cc: Lakefront Communications, Inc.

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¹ FCC 98-269, In the Matter Reexamination of the Comparative Standards for Noncommercial Educational Applicants.

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Reexamination of the Comparative)
Standards for Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

**REPLY COMMENTS OF
LAKEFRONT COMMUNICATIONS, INC.**

Lakefront Communications, Inc. ("Lakefront"), by its attorneys, and pursuant to Section 1.415 of the Commission's Rules, files these Reply Comments in the above-referenced docket. Lakefront herein replies to matters raised in comments filed by certain parties in response to the Commission's *Further Notice of Proposed Rule Making* ("FNPRM"), 13 FCC Rcd 21167 (1998).¹ In reply, Lakefront shows the following:

Background-Standing

Lakefront is licensee of two commercial FM radio stations² in the Milwaukee, Wisconsin, market, and is an applicant for a construction permit for a new FM translator **on a commercial³ channel** to rebroadcast the programs of one of those stations. That

¹ Time for filing replies has been extended to March 15, 1999; thus, this pleading is filed timely.

² Lakefront is also licensee of two AM stations and, through a subsidiary, a third commercial FM station in the Milwaukee market.

³ Lakefront uses the word "commercial", as does the Commission (FNPRM ¶34), to describe non-reserved frequencies in the FM band for which either noncommercial or commercial entities may apply.

application is mutually-exclusive with an application for construction permit for a new FM translator **on a commercial channel** filed by a noncommercial educational (“NCE”) broadcaster. The Commission has not resolved the mutual exclusivity and the applications remain pending. The outcome of this docket may determine whether Lakefront or the NCE broadcaster will receive the construction permit. The NCE broadcaster filed initial comments in this docket.⁴ In light of the above, Lakefront is an “interested party” and has standing to file these reply comments. In addition to responding to the WECB comments, Lakefront also responds to other comments filed in this proceeding.

Discussion

Lakefront’s reply is limited to the issues raised at ¶¶34-45 of the *FNRPM*, *i.e.*, “Noncommercial Educational Applicants on ‘Commercial’ Frequencies”. The Commission initially proposed, in *Competitive Bidding*,⁵ that NCE applicants could continue to apply for nonreserved spectrum in the new auction environment by participating in spectrum auctions along with commercial applicants. However, the Commission did not receive “sufficiently focused comment” in that proceeding to resolve this issue. Therefore, in the *FNPRM*, the Commission specifically addresses the problem

⁴ See “Comments of Noncommercial Educational Broadcast Licensees on Use of Spectrum Not Reserved for Noncommercial Use” filed January 28, 1999, by State of Wisconsin - Educational Communications Board, et al. Herein, these comments are referred to as “WECB” comments.

⁵ *Competitive Bidding for Commercial Broadcast and ITFS Service Licenses*, 12 FCC Rcd 22363 (1997) [Notice of Proposed Rule Making] and *Report and Order*, FCC 98-194, released August 18, 1998.

which has arisen as a result of NCE broadcasters applying for construction permits on nonreserved frequencies that may also be the subject of applications filed by commercial broadcasters.

Auctions Are the Appropriate Method to Resolve These Cases

The Commission questions whether Section 309(j)(2)(C)⁶ of the Communications Act of 1934, as amended, forbids the Commission to auction frequencies where NCE applications compete with commercial applications. Predictably, in *Competitive Bidding*, the parties urged the Commission to resolve this question in the way that would most favor their pending or proposed applications. Lakefront is filing this reply in response to WECB's comments that, just as predictably, argue that the Commission cannot auction frequencies that may be applied for by a noncommercial applicant.⁷ WECB argues that auctioning nonreserved frequencies proposed for noncommercial educational use would be contrary to the public interest. WECB's basis for this is that state and federal money supports some NCE broadcasters (presumably, like WECB). Also, WECB claims that auctioning would make no logical sense because (a) AM radio stations and TV translator stations have no channels "reserved" for NCE use and (b) while some FM translator

⁶ This section provides that competitive bidding "shall not apply to licenses or construction permits issued by the Commission...for stations described in Section 397(6)" of the Communications Act.

⁷ Likewise, Lakefront opposes the arguments made by National Public Radio, Inc., *et al.*, that auctions would violate the Balance Budget Act of 1997 and public policy. No controlling precedent was cited to support that position. On the otherhand, Lakefront supports the legal reasoning in the Comments of De La Hunt Broadcasting, Big Sky Broadcasting, and Jack I. Gartner that Section 309(j)(2)(C) does not preclude the Commission from using auctions to award these licenses.

channels are set aside for NCE use, the majority of non-reserved FM translator channels are used by noncommercial broadcasters due to the eligibility restrictions on commercial FM translators imposed in Section 74.1232 of the Rules.

However, WECB ignores the fact that, where the signal from an FM station's main transmitter is blocked or weak, the FM translator may fill in that area of the commercial station's contour. Such is the situation of Lakefront: the FM translator frequencies are within the service area of this commercial FM station and are to be used for "fill-in" purposes. If the Commission adopts WECB's proposal then an application for a fill-in FM translator that becomes mutually-exclusive with an NCE application would rarely succeed. This problem, as well as others, would be eliminated by auctions.

Lakefront takes no position on whether NCE applicants should be rendered ineligible for non-reserved channels; however, Lakefront strongly disagrees with WECB's position⁸ that the NCE/commercial "dilemma" can be resolved by a determination as to whether there is a greater "public need" for NCE or commercial use of the channel.⁹ If the need for an NCE channel were greater, the determination of the permittee would be made only among the NCE applicants, assuming there are more than

⁸ WECB Comments, p. 8.

⁹ Likewise, Lakefront disagrees with the proposal of Faith Broadcasting, Inc., Sister Sherry Lynn Foundation, Inc., and Moody Bible Institute of Chicago to give NCE applicants a preference based on the unavailability of NCE frequencies. Lakefront disagrees with the proposal made by Pensacola Christian College that would have the effect of making commercial applicants ineligible if there were a showing made that no NCE channels were available in the area in question. Lakefront opposes the concept of initial lotteries among NCE applicants as proposed by Kaleidoscope Foundation, Inc., since it would eliminate commercial applicants anytime an NCE applicant won the lottery.

one. On the other hand, says WECB, if the NCE need **“is not greater, the applicants would proceed to auction under the existing, applicable rules for broadcasters.”**

Such a determination would probably be unworkable because it involves the difficult problem of deciding which applicant has presented a case for the greater need for the translator. The Commission has tried before and been unable to develop a system that makes “public interest” determinations of the type advocated by WECB. See, for example, *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965), overturned as arbitrary and capricious in *Bechtel v. FCC*, 957 F. 2d 873 (D. C. Cir. 1992). Because it is now possible to auction the frequencies, the Commission can avoid the time, expense, and doubtless court appeals that would follow from adopting WECB’s proposal.

It is also clear that adopting WECB’s idea would give NCE applicants two bites at the apple while leaving commercial applicants only one. First, an NCE applicant would get a chance to establish a need for an NCE service. Then, in the event the NCE applicant failed to make a persuasive showing, the NCE applicant would then get to participate in the auction. That is fundamentally unfair to commercial applicants. NCE applicants using commercial frequencies already enjoy exemption from the payment of filing fees and regulatory fees that commercial applicants on the same types of channels must pay. Given these benefits as well as having FM spectrum specifically reserved for NCE applicants, it is unreasonable to require the government to give away this valuable spectrum. Even though colleges and universities and other non-profit entities generally enjoy benefits such as tax exemption, nonetheless, they still must compete in the commercial marketplace when they purchase land and buildings and want to attract good

faculty members, researchers or other employees. Requiring an NCE broadcaster to participate in an auction for a commercial frequency is no different than requiring a university to purchase assets at commercial rates.

Lakefront believes that auctions should be used to award commercial frequencies without regard to the nature of the applicant. Lakefront believes no bidding credit should be given to NCE broadcasters. Any other process is unfair to commercial broadcasters. It is not inconceivable that so-called “NCE broadcasters” could file applications for any and all commercial spectrum that the Commission may allot in the future, obtain the frequency on a showing of greater “public interest” need, and then sell the spectrum to a commercial broadcaster. The Commission indicated its awareness of this potential for fraud in *FNPRM* ¶42, and some of the commenting parties have suggested ways to minimize this risk. However, by far the simplest way for the Commission to avoid fraud and expedite the award of these **commercial** frequencies is simply to auction them.

Additionally, the *FNPRM* also raises the issue of whether bidding credits should be available to NCE broadcasters. Lakefront opposes such credits since there is no showing that NCE broadcasters are in every case less able to pay for spectrum than commercial broadcasters.

The only part of WECB’s position with which Lakefront agrees is that Section 309 does not bar the participation in auctions by NCE applicants.

Pending Applications

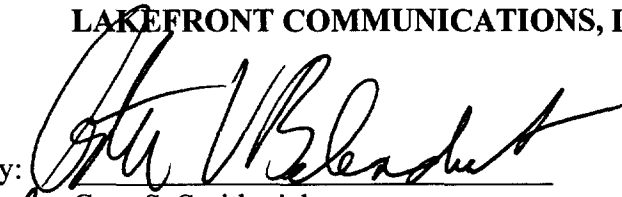
Lakefront believes that pending applications by NCE and commercial applicants for commercial frequencies should be the subject of an auction. That is the fairest way to

dispose of the matter. The procedures advocated by WECB could have the effect of rendering, *ipso facto*, commercial applicants ineligible. On the other hand, an auction would provide an opportunity for both commercial and NCE applicants to bid for the frequency. Auctions would obviate the Commission's need to devise a point system.¹⁰ One can already sense the difficulty by reviewing other comments in the proceeding which seek to construct "point systems." In each case, the implementation thereof would presumably favor the commenter's application above others. Devising a point system which could resolve mutually-exclusive applications filed by commercial and NCE applicants could create a legal quagmire that the FCC should avoid at all costs.¹¹ It can be avoided easily by adopting the auction method.

Respectfully submitted,

LAKEFRONT COMMUNICATIONS, INC.

By:



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March 15, 1999

¹⁰ The Commission has acknowledged the "difficult task of devising a point system equally appropriate to commercial and noncommercial applicants," *FNPRM* ¶44.

¹¹ See, for example, the comments supporting a point system filed by the Regents of the University of California and the National Federation of Community Broadcasters.

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law offices of Smithwick & Belendiuk, P.C., certify that on this 15th day of March, 1999, copies of the foregoing were mailed, postage prepaid, to the following:

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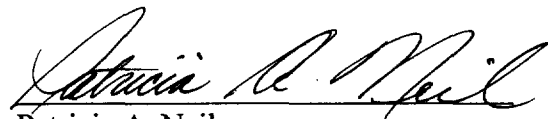
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